SUMMARY OF PETITION FOR REHEARING.

SUMMARY OF PETITION FOR REHEARING (CONTINUED).

AUTHORITIES CITED.

AUTHORITIES CITED (CONTINUED).

SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. 556

CITIES SERVICE GAS COMPANY, a corporation,
PETITIONER,

vs.

FEDERAL POWER COMMISSION; PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI; the CITY OF KANSAS CITY, MISSOURI; STATE CORPORATION COMMISSION OF KANSAS; and CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION OF CITIES SERVICE GAS COMPANY FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI HEREIN.

The judgment of this Court denying petition for writ of certiorari was entered herein on November 12, 1945.

Respectfully, the individual members of this Court are asked, in the exercise of a "sound judicial discretion" upon

the foundation of numerous "special and important reasons"[1] manifestly here present, at this time to give direct and specific judicial consideration to the broad, basic, unsettled and probably or certainly erroneously decided issues presented in this record, to the end that there be the actual statutory judicial review on the merits as contemplated, authorized and commanded by the Congress in the Natural Gas Act.

Judicial review under *Section 19(b)* of the Gas Act, before this Court as well as before a court of appeals, is identical in substance with and in the exact legislative language employed in several of the numerous standard and established statutory judicial reviews of orders of other federal administrative agencies accorded by the Congress *(Pet. for Certiorari, Supporting Br., pp. 42-43).* In no other situation has there been so much judicial discussion of and insistence upon the narrow limits of statutory reviews as in cases arising under the Gas Act. "We do not stop to develop" the background and motivating theories thereof.

For example, notwithstanding the very special and rigid rule laid down by Congress in the Internal Revenue Code, restricting judicial review of the decisions of the Tax Court solely to "a clear-cut mistake of law," this Court has found it proper and indeed necessary in the exercise of a "sound judicial discretion" to grant certiorari in numerous and variant cases. In several instances certiorari was granted after once denying petitions therefor. See decisions cited in Footnote 4, *infra.*

On the other hand, it is striking that up to this time this Court has refused to grant the full statutory review to any natural gas company. In some cases it granted highly restricted reviews[2] which actually operated: largely to defeat the judicial supervision and review contemplated by Con-

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1. See Rule 38, this Court.

2. Colorado Interstate Gas Co. v. Federal Power Comm., 324 U. S. 581, 65 S. Ct. 829; Colorado-Wyoming Gas Co. v. Federal Power Comm., 324 U. S. 626, 65 S. Ct. 850; Panhandle Eastern Pipe Line Co. v. Federal Power Comm., 324 U. S. 635, 65 S. Ct. 821; Canadian River Gas Co. v. Federal Power Comm., 324 U. S. 581, 65 S. Ct. 829.

gress; to commit fundamental and vital questions virtually to uncontrolled Commission "discretion"; and to leave undetermined important principles and questions of statutory construction.

While a review in this Court on writ of certiorari "is not a matter of right," as it is in the Court of Appeals *(Sec. 19(b)* of the Gas Act), nevertheless the function and duty of this Court is the exercise of a "sound judicial discretion," which requires no extensive definition, elaboration or citation of authority. The very words carry their own impressive credentials. It is a "judicial" judgment, deliberate and considered, consisting of and resulting from inquiry into the sufficiency of the legal and equitable foundations of the "findings," conclusions of law and pronouncements sought to be reviewed, agreeable to the established institutions, usages and principles of law constituting our system of government, and conformable to the facts, to reason, to fairness and to the normal processes of logic.[3]

The "special and important reasons," here present, which are amply sufficient to require the supervision of this Court, include among other things: a decision of a federal question by a circuit court of appeals and by a federal administrative agency "in a way probably in conflict with applicable decisions of this Court"; a decision by a circuit court of appeals and by a federal administrative agency probably in conflict with the governing Act of Congress; a decision by a circuit court of appeals and by a federal administrative agency probably involving erroneous conclusions of law; a decision by a circuit court of appeals refusing "to exercise its authority when it is its duty to do so"; a decision of a court of appeals which probably must be re-

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3. This Court, succinctly and broadly, has stated the governing standard:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich, Claimant, v. Morgan, 186 U. S. 1, 9, 22 S. Ct. 731, 46 L.Ed. 1027. When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." Langnes v. Green, 282 U. S. 531, 541, 51 S. Ct. 243, 247.

garded "as having repudiated jurisdiction" imposed on that court; and questions "which later must be taken because of conflict" or to clarify confusion and uncertainty or to avoid multiplicty of suits.[4]

The bald fact, that questions of "gravity and general importance," not heretofore authoritatively determined, are here involved cannot be cast aside and rejected in the face of the record and issues presented and on file in this Court.

In this connection, as highly relevant and being a matter of common and general knowledge, the attention of this Court is invited to the pending proceeding before the Federal Power Commission, entitled Re: Natural Gas Investigation, Docket G-580, undertaken, according to the Commission "agenda" released June 27, 1945, to investigate "the interstate aspects of the natural gas industry in which the Commission is concerned." In this proceeding, during the current year 1946, numerous and extensive hearings were held in various cities in both the gas-producing and gas-consuming States. Appearing and participating therein, in addition to groups directly representing all phases of the natural gas industry throughout the country, that is, production, transmission, distribution and consumption, were the oil industry on a nation-wide basis, various States concerned in various phases of the natural gas business from production to consumption, represented by their Governors and regulatory bodies, numerous consumer groups, and many others concerned in one way or another in the matters under consideration. From all sources and from all participants, except the Power Commission, the ultimate and insistent complaint was abuse of its authority and disregard of the statu-

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4. See: Rule 38, this Court; McDonald v. Comm'r. Int. Revenue, 323 U.S. 57, 65 S.Ct. 96; Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455; Connecticut L. & P. Co. v. Federal Power Comm., 324 U.S. 515, 65 S.Ct. 749; R. Simpson & Co., Inc., v. Comm'r. Int. Revenue, 321 U.S. 804, 64 S.Ct. 496; Comm'r. Int. Revenue v. Wilcox, ——U.S.——, 66 S.Ct. 546; United States, etc., Assn. v. United States, 325 U.S. 196, 65 S.Ct. 1120; John Kelly Co. v. Comm'r. Int. Revenue, ——U.S.——, 66 S.Ct. 299.

See Pet. for Cert. and Supporting Brief, pp. 3-5, 28-29, 41-46.

See also Meredith v. City of Winter Haven, 320 U.S. 228, 229, 237, 64 S.Ct. 7, 9, 12; Federal Trade Comm. v. American Tobacco Co., 274 U.S. 543, 47 S.Ct. 663.

tory limits of its jurisdiction by the Commission, and the failure of the courts to exercise supervision, restraint, control and correction over the now practically uncontrolled activities of that agency. Therein was abundantly disclosed, as present and immediate, questions of very great "gravity and general concern" on a nation-wide basis and affecting substantially in various ways most producers, transporters, distributers and consumers of natural gas.[5]

The several applications herein for leave to appear and to present briefs *amici curiae* by organizations, with a combined nationwide membership in excess of 15,000 and broadly representative of the gas and oil industries, also attest to the fundamental character of, the general concern respecting and the extreme seriousness of the far-reaching and basic questions and principles, among others, herein at issue, to-wit: the Commission-asserted jurisdiction over production and gathering; the Commission refusal under its "cost" theories to consider the "value" of natural gas and natural gas reserves; and the judicial denial of any real right of actual review.

It is true *as a matter of law* that "a denial of certiorari by this Court imports no expression of opinion upon the merits of a case" *(House v. Mayo,* 324 U.S. 42, 48, 65 S.Ct. 517, 521), and so settles and determines no questions, issues or principles whatever. It is also true *as a matter of fact* that the improper, arbitrary and illegal procedures, actions and determinations of fact, of law and of jurisdiction indulged by an administrative agency or by a court of appeals, upon such denial, automatically become clothed with a *de facto* propriety and validity.

The practical result of denial of the writ in this case is simply to aggravate the legal uncertainty and doubt heretofore and now existing; to postpone without day the resolution of the several questions presented, with respect to which this Court as yet has made no authoritative or any

5. See briefs therein of Natural Gas Industry Committee, American Petroleum Institute, Independent Natural Gas Association of America, Independent Petroleum Association, Texas Mid-Continent Oil & Gas Association, and many others.

determination; to lend the color of propriety to the refusal of the court of appeals to perform its mandated duty of review *(Pet. for Cert., p. 4)*; and to sanction the grievous and irreparable injury inflicted upon petitioner.

The overt state of affairs now existing which justifies and requires judicial consideration and "re-view," is summarized as follows:

I.

The present status of the question of jurisdiction of the Power Commission over "the production or gathering of natural gas" is:

1. The Gas Act *(Section (1)b)* provides "*The provisions of this Act* * * * shall not apply * * * to the production or gathering of natural gas."

2. The Power Commission, herein, without comment or explanation, incorporated the production and gathering facilities including the natural gas leaseholds and reserves of petitioner, in the over-all utility rate base, and in the so-called rate base of the regulated business.

3. The Court of Appeals herein held that Commission jurisdiction over production and gathering had been "squarely met and conclusively decided" by this Court in the *Canadian River Gas Company* case, *supra (R. V. 3, p. 1328)*.

4. This Court disposed of the *Canadian River Gas Company* case, *supra*, by three divergent opinions in which the alignment of the Court was five to four that the Commission does not have jurisdiction over "any direct regulation of that activity" *(See Pet. for Cert. Supporting Brief, pp. 47-49)*. The same opinions, on the basis of eight to one, recognized that "reflecting the production and gathering facilities in the rate base" in fact was the exercise of direct regulation of that activity.[6]

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6. See Southern Pacific Co. v. Interstate Commerce Comm., 219 U.S. 433, 31 S.Ct. 288, 290-291. In that case this Court quickly disposed of the fiction that by labelling the act of regulation as something else and less, it ceased to be regulation. Chief Justice White, speaking for the entire Court, brushed aside the Commission contention that it had "simply taken into consideration," as here claimed, "some of the elements proper to be considered in

5. If any "authoritative determination" of "the principles of law involved" was made through "agreement by a majority of the Court" in that case, it was that the Commission does not possess the jurisdiction of "direct regulation over that activity" and that "reflecting the production and gathering facilities in the rate base" was the exercise of direct regulation. Otherwise "the lack of an agreement by a majority of the Court * * * prevents it (the decision in the *Canadian* case) from being an authoritative determination for other cases."

6. It is evident, therefore, that the Court of Appeals "acted under a misapprehension as to the meaning of the statute," and the decision of this Court in the *Canadian River Gas Company* case, *supra*.[7]

II.

The Commission insistence upon "cost," and its refusal to consider the "value" of natural gas as a commodity and of natural gas reserves, involve the following:

1. The Commission, in approving the refusal of its trial examiner to receive any evidence of "value" of gas reserves, did so on the ground that *Section 6(a)* of the Gas Act required such exclusion *as a matter of law*. The Commission's contention in that behalf as stated is: "Our view as to why such evidence should be excluded has been stated in earlier opinions" *(R. V. 1, p. 31; Reply Br. Pet. for Cert., pp. 5-9)*.

2. Such exclusion, in this case, operated in 1941 to require petitioner *to give away without any compensation whatever*, aside from certain of the actual expenses of production, about two-thirds of its own total production of natural gas. Such production, in 1941, was 43,150,770 M.c.f. *(R. V. 3, p. 1343)*.

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the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one." Thereupon the Court applied the true test, that the nature and character of its order determined the substance of the power which the Commission undertook to exert in making such order.

7. Pet. for Cert. and Supporting Brief, pp. 6, 47-49; Reply Brief, pp. 4-5. See Southern Pac. Co. v. Interstate Commerce Comm., 219 U.S. 433, 31 S.Ct. 288, 290-291.

3. Further, such exclusion, if the Commission order is allowed to stand, will operate to require petitioner, in all years thereafter and hereafter, to continue similarly *to give away* each year even larger amounts of gas than in 1941.

4. This Court, repeatedly and specifically, has declared, contrary to the asserted rule of law upon which the Commission relied here, "that the Commission was not bound to the use of any single formula in determining rates"; and that "the question for the courts when a rate order is challenged is whether the order viewed in its entirety and measured by its end result meets the requirements of the Act," that is, among other things, whether it satisfies the statutory standard of "fair and reasonable." *(Pet. for Cert. and Supporting Brief, pp. 7-9, 49-58; Reply Br. Pet. for Cert., pp. 5-9).*

5. This Court, in the *Canadian River Gas Company* case, *supra,* the one case in which the question was sought to be raised, expressly refused because of "the limited review granted the case," to pass upon the "end result" of "including the production properties in the rate base at actual legitimate cost" *(Pet. for Cert. and Supporting Brief, pp. 7-8, 52; Reply Br. Pet. for Cert., p. 8).*

6. Notwithstanding the misconception of the law by the Commission, the Court of Appeals refused to consider that which this Court described as "the question for the courts." That Court additionally misapprehended the law and the holding of this Court in the *Canadian* case by its stated conclusion that the question had been "specifically treated on appeal" and disposed of in that case.

7. Moreover, there is no support whatever in the law for the impossible burden which the Court of Appeals attempted to impose upon this petitioner and every other utility, to-wit: "We have not the right to intercede unless it is *conclusively shown* that *failure to give consideration to the fair value* of properties, including the valuable leasehold estates, *will prevent the company from operating successfully as a public utility*" *(R. V. 3, p. 1332; Reply Br. Pet. for Cert., pp. 6-7).*

8. Thus as to this issue, the Court of Appeals, as well as the Commission, "has not proceeded under a correct rule

of law" or correct rules of law. This "value" issue, as yet undecided by this Court, certainly by every standard of importance is one of very great "gravity and general concern" to all producers, transporters and consumers of natural gas, as well as to this petitioner *(Connecticut L. & P. Co. v. Federal Power Comm.,* 324 U.S. 515, 65 S.Ct. 749).

III.

In connection with the subject matter "existing depreciation" and the disposition thereof by the Commission and by the Court of Appeals, the situation presented is:

1. The Commission, as required by law, sought *by evidence* to establish *the facts* of "existing depreciation," and therefrom the annual depreciation rates to be used under the "service life" method adopted by the Commission and its staff *(R. V. 1, p. 45).* The Commission evidence thus undertook to lay the foundation for the conclusions contained in the two *essential* and only Commission exhibits on the subject *(Comm. Ex. 15, R. V. 3, pp. 1127-1141,* entitled "Service Lives and Annual Depreciation Rates"; *Comm. Ex. 12, R. V. 3, pp. 1039, 1042,* entitled "Annual and Accrued Depreciation"). *Exhibit 15* purported to contain a factual determination of both the physical and functional elements of depreciation *(R. V. 1, pp. 427, 430; R. V. 3, pp. 1127-1128).* The Commission depreciation engineer *(R. V. 1, p. 72),* who prepared *Exhibit 15* and presented it in evidence, is the "qualified staff engineer" who the Commission found "inspected the Company's properties" and who, based on his first hand knowledge, "treated realistically both the physical and functional aspects of depreciation" *(R. V. 1, p. 44).*

2. But this witness testified specifically that he never inspected a single length of pipe in petitioner's 4300 mile pipeline system, which constituted 70% of its entire constructed plant, according to the Commission *(R. V. 1, pp. 450-451; Op. of Ct., R. V. 3, pp. 1334-1335; Comm. Ex. 5, pp. 977-978; R. V. 1, p. 50).*

3. The foregoing finding of the Commission *(R. V. 1, p. 44)* clearly was foundational to the permissible introduction of *Exhibits 15 and 12* in evidence. The finding, how-

ever, was not supported by but contrary to the uncontroverted facts. In short, it was not true.

4. The Court of Appeals, fully aware of this failure of proof, was unable to acquiesce in the Commission's distortion of the record. Accordingly, that Court made its own finding, in substitution for the discredited Commission finding wherein it sought to excuse such failure of proof and the unsupported finding *(R. V. 3, pp. 1334-1335)*.

5. The patent result is that the Commission did not meet the burden specifically imposed upon it by *Section 19(b)* of the Gas Act; and the Court of Appeals made findings and substituted them for those of the Commission, which it is not authorized by law to do *(Colorado-Wyoming Gas Co. v. Federal Power Comm., 324 U.S. 626, 634, 65 S.Ct. 850, 854)*. The applicable law as declared by this Court is clear.

IV.

The Commission-determined alleged "excess profits" of Cities Service *Oil* Company under contract with this petitioner, Cities Service *Gas* Company, for the extraction of natural gas gasoline from a portion of the gas produced and purchased by petitioner, were "credited" to "the operating expenses" of this petitioner under the following circumstances:

1. The affiliate relationship between petitioner and the *Oil* Company admittedly and properly is subject to Commission and judicial inquiry to insure that the contractual relation in question be reasonable and equivalent to "arm's length dealing" *(Pet. for Cert. and Supporting Brief, pp. 11-13, 62-66; Reply Brief, pp. 12-13)*.

2. The Commission, it is conceded, made no attempt whatever to make such inquiry into or determine the reasonableness of the transaction in question on the basis of "arm's length dealings" *(R. V. 2, pp. 798, 802)*. The petitioner does not have and never has had any title or interest whatever in the extraction plants and operations of the *Oil* Company *(R. V. 3, pp. 1033, 1037)*. The Commission *admittedly* treated the extraction plants, business and earnings of the *Oil* Company "as if they belonged to petitioner"

(Op. of Ct., R. V. 3, pp. 1335-1337; R. V. 1, pp. 53-55; R. V. 2 pp. 792, 802). It set up a "cost" rate base for the *Oil* Company plants and *allowed* that Company 6½% return thereon (after allowance of certain expenses but not including Federal income taxes) *(R. V. 1, p. 54; R. V. 2, pp. 805, 806; R. V. 3, p. 1021).* All earnings of the *Oil* Company, which is not a "natural gas company" under the Gas Act, in excess of the purported "return at 6½% on rate base," averaged for the years 1939-1941, were declared to be "excess earnings" *(R. V. 2, p. 800)* and "credited" as above stated to "the operating expenses" of this petitioner *(R. V. 1, pp. 53-55).* This amounted to seven-eighths of all such earnings, including earnings upon such extraction from natural gas which went into the non-regulable sales of petitioner in addition to its regulated sales *(R. V. 1, pp. 53-55).*

3. The two natural gasoline extraction plants in question were from 150 to in excess of 250 miles, respectively, from the fields of production of the gas processed. Enroute most of the gas passed through five compressor stations *(Map, Comm. Ex. 14, Sch. 1, R. V. 3, p. 1119; R. V. 2, pp. 775, 776).* These blunt uncontroverted facts improperly were ignored by the Court of Appeals *(Connecticut L. & P. Co. v. Federal Power Comm., supra).*

4. The "findings" of that Court were an attempt, by an inaccurate recital of the direct testimony of the Commission "staff witness," to justify the Commission action here, under "the theory" of *Cleveland v. Hope Natural Gas Company,* 44 P.U.R. (n.s.) 1, 27-28, where there were specific findings supported by the evidence that "the extraction of gasoline and butane * * * is necessary to make the natural gas marketable and transportable."[8] The Commission added,

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8. Even if, contrary to the facts of this case, the extraction of natural gas gasoline were necessary to make the natural gas marketable and transportable, the established principles of law controlling the dealings between affiliates would not thereby be altered or repudiated. This argument of "necessity" upon which the Commission and Court of Appeals rely would apply equally and without limit to extend the jurisdiction of the Commission, contrary to the direct statutory limitations, to other non-regulated activities, conceived by the Commission to be physically, economically or otherwise "essential" or "necessary" to the "natural gas company" business and operations.

"It is significant that Hope Natural Gas Company processed its own gas before 1920." Neither before the Commission nor on review *(Hope Natural Gas Co. v. Federal Power Comm.,* 134 Fed. (2d) 287, 307) did the company there involved raise any issue as to the propriety of such Commission action.

5. The result, on the facts and under controlling law, appears arbitrary and illegal. The Commission and Court of Appeals alike ignored the established principle of law declared and enforced by this Court, that the *Oil* Company "is to be treated as a segregated enterprise" even though the affiliate relation "may demand close scrutiny" *(Smith v. Illinois Bell Tel. Co.,* 282 U.S. 133, 144, 151-153, 51 S.Ct. 65, 67, 70; *United Fuel Gas Co. v. Commission,* 278 U.S. 300, 321, 49 S.Ct. 150, 156; *Canadian River Gas Co. v. Federal Power Comm.,* 324 U.S. 581, 615-625, 65 S.Ct. 829, 845-850; *Southern Pacific Co. v. Interstate Commerce Comm.,* 219 U.S. 433, 31 S.Ct. 288, 290-291). In the case last cited, Chief Justice White, dealing with an analogous situation, exploded the present Commission assertion *(Comm. Br. p. 17)* that the expropriation in this case of the gasoline extraction plants and business of the *Oil* Company was merely the "use of data" and did not constitute "regulation of the gasoline extraction business" of that Company, which admittedly is beyond Commission jurisdiction.

The Court of Appeals additionally undertook to make findings of its own to support and give the mark of validity to the Commission action. This, of course, it had no authority to do *(Colorado-Wyoming Gas Co. v. Federal Power Comm., supra).*

V.

The elimination and exclusion by the Commission of *all* "Federal income taxes," an item of actual operating expense, from the Commission total "cost of service" *(R. V. 1, pp. 57-58)* and thereafter from its so-called "cost of service allocation" *(R. V. 1, p. 61)*, presents the following considerations:

1. The Commission, in making such elimination and exclusion, proceeded *on the legal theory* that all earnings of

petitioner upon the supposed non-regulable business, in excess of 6½%, on whatever undisclosed portion of the *overall* "rate base of $48,567,756" *(R. V. 1, pp. 50-58)* covering all properties and operations, which the Commission assumed to assign to such non-regulable operations, are "excess earnings" and, therefore, illegal *(R. V. 3, p. 1337; R. V. 1, p. 58)*.[9]

2. The Commission, in making such elimination and exclusion, proceeded *on the factual assumption* that, in its determination of Federal income taxes, *all* usual and ordinary expenses of *the entire business* and all other lawful tax deductions *in full* could be utilized *as was done in this case,* for the sole benefit of petitioner's earnings up to 6½% on the non-regulable as well as the regulable business. The purpose and effect of this improper procedure was to produce a mathematical and accounting result, which on its face would purport to show no Federal income tax on a return of "6½% on the over-all rate base," and thus "assign all Federal income tax liability • • • to non-regulable sales" *(R. V. 3, p. 1337)*. The evident fact is that *such* Federal income tax liability could be ascertained only by a proper segregation of expenses and other deductions, as well as of revenue, between the 6½% over-all return and the return on the non-regulable business in excess of 6½%. There is nothing of the kind in the record *(Pet. for Cert. Reply Brief, pp. 15-17)*.

3. The factual assumption, which strains logic to absurd extremes, is unfair and unreasonable. The legal theory is arbitrary and illegal *(Galveston Electric Co. v. Galveston,* 258 U.S. 388, 42 S.Ct. 351; *Vinson v. Washington Gas Light Co.,* 321 U.S. 489, 502-503, 64 S.Ct. 731, 737, dissenting opinion Mr. Justice Douglas).

4. The Commission procedure here under discussion indicates with clarity the stern necessity for judicial supervision and correction. This duty the Court of Appeals re-

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9. See, to the contrary, Panhandle Eastern Pipe Line Company case, supra, 324 U.S. at pages 641-642, 65 S. Ct. at page 825; Colorado Interstate Gas Company case, supra, 324 U.S. at pages 586-589, 65 S.Ct. at pages 832-833.

fused to perform. First, it reiterated and adopted the erroneous legal theory of the Commission. Second, in the factual premise indulged by it, to-wit: "If, as the Commission found, there would be no Federal income tax liability under the 1941 rates on a permissible return from the adopted rate base" *(R. V. 3, p. 1337)*, that Court overlooked completely the fact *that on this record* no such determination was made or could be made. Thus, that Court proceeded under a misconception of the law as well as a misapprehension of the entire absence of essential evidence to support the Commission's factual assumptions *(Pet. for Cert. and Supporting Brief, pp. 13-16, 34-35, 66-68; Reply Br., pp. 15-17)*.

VI.

"The necessity" for the separation of the regulated and unregulated "facilities and operations" of petitioner to insure that no part of the unregulated business "be assigned to the regulated business" which "would transgress the jurisdictional lines which Congress wrote into the Act" *(Panhandle Eastern Pipe Line Co. v. Federal Power Comm., supra)*, presents in this record serious problems of law and fact:

1. The Commission made no such actual separation. It did indulge what it described as an "allocation of cost of service." Such procedure this Court in general has approved. However, nothing in this record, or in the opinion of the Commission, discloses compliance with the governing standards of jurisdiction, judgment and fairness laid down by this Court in the *Panhandle Eastern Pipe Line Company* and *Canadian River Gas Company* cases, *supra (Pet. for Cert., Supporting Brief, pp. 68-75; Reply Brief, pp. 17-19)*.

2. The Court of Appeals was insensitive to its judicial function of review and flatly refused to examine, consider or review at all any part of the Commission so-called allocation procedures and results, on the assigned reason "We shall not criticize that which we are powerless to correct," although at the same time expressly recognizing that "some

of the specific allocations appear to be illogical and unfair" *(R. V. 3, p. 1339)*.

3. This action of the Court of Appeals is contrary to the express declarations and actual procedures of this Court in the cases above referred to and in *Colorado-Wyoming Gas Co. v. Federal Power Comm., supra.* The right to and duty of judicial review embraces questions of allocation even though they "pose technological problems of accounting and finance" *(R. V. 3, p. 1339)*.

It is not the law that courts are excused from the performance of their judicial functions of mandated review because the issue involves technical or technological problems or because of any other extraneous considerations *(Pet. for Cert., pp. 16-19; Supporting Brief, pp. 68-75; Reply Brief, pp. 17-19)*.

CONCLUSION.

The Court of Appeals did not undertake to define and execute its own functions and duties as the court of review, but by its repeated assertions and conclusions as to the finality of the administrative process disclosed a philosophy wholly at variance with any real or effective judicial supervision and review whatever *(R. V. 3, pp. 1327, 1328, 1332, 1339; Pet. for Cert., p. 4)*.

Judicial review is "more than an abstract ideal." It is not mere theory. It is a practical concept and "has proved its efficiency." It is not to be dispensed or withheld at will. The "discretion" involved is otherwise directed and governed.

Judicial review "is a way of life worked out by human hands and brains" from the very inception of the Republic, as a necessary, salutary and foundational principle of action to preserve and protect rights; to enforce the performance of duties; and to confine the activities of agencies of government within the prescribed limits and manner of exercise of their respective functions.

Important principles, serious issues and numerous probable or certain errors are not settled, are not resolved and are not corrected, by the silence of a formal refusal to consider them. However heavy the burdens of judicial administration may be, the fact still remains that the substance and spirit of the judicial function cannot be realized merely by adherence to and performance of the formality of procedures.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

Donald C. McCreery, one of counsel for Petitioner, hereby certifies that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

Dated at Denver, Colorado, this 2nd day of December, 1946.

DONALD C. MCCREERY.